[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 912

CONTRACTORS CARGO CO., APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a decision (299 F. Supp. 287; J.S. 1a–13a) and final judgment (J.S. 14a) of a three-judge district court dismissing a complaint brought to set aside a Commission order requiring appellant to cease and desist from conducting operations found to be unauthorized by its operating authority. (96 M.C.C. 306, J.S. 15a–37a; affirmed on reconsideration, 105 M.C.C. 683, J.S. 37a–88a).

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Appellant, a motor vehicle contract carrier, initiated a Commission proceeding in 1962 for a determination of the territorial scope of its permit and, if necessary, for additional operating rights. Subsequently, competing carriers filed a complaint charging, among other things, that appellant had operated beyond the scope of its permit, and the Commission also instituted its own investigation. All three proceedings were consolidated for hearing and determination (J.S. 15a–16a).

The issue common to each proceeding, and the sole issue involved in this appeal, is the territorial scope of appellant's permit. That permit (J.S. 38a–39a) authorizes appellant to transport:

> *Construction materials and contractor's machinery, supplies and equipment,* * * *.
> Between railheads in California, Arizona, New Mexico, Oregon, Washington, and Nevada, and construction projects or other points of use in California, Arizona, New Mexico, Oregon, Washington, and Nevada, within 100 miles of such railheads; or between such construction projects or points of use and the nearest railhead, when none is located within 100 miles thereof.

Appellant contended that its permit is clear on its face, and confers "non-radial" authority; that is, it permits operations anywhere within the designated area without reference to the base points. (J.S. 18a–19a). After full administrative proceedings, the Commission found that the "permit is patently indefinite

and ambiguous and that the record in the proceedings underlying [appellant's] permit must be examined in order to aid in its interpretation" (J.S. 22a).[1] Upon such examination, the Commission concluded that the permit confers only "radial" authority authorizing service from or to a particular base point, *i.e.*, movements from a railhead to a construction site or other point of use within 100 miles of the railhead, or return (J.S. 23a).[2] Accordingly, the Commission issued a cease and desist order (J.S. 36a) requiring appellant to conform its operations to this reading of the permit.

The three-judge district court unanimously sustained the Commission's decision. It ruled that the permit "is ambiguous, and the Commission properly resorted to the record to aid in its construction"; and that "the Commission's order is within its statutory authority, is reasonable, and is based on adequate findings supported by substantial evidence in the record" (J.S. 6a).[3]

[1] The permit was originally issued to Ellsworth Pexton, who transferred it to Constructors Transport Co., which transferred it to William A. Hufnagel, d/b/a Contractors Cargo Co. Appellant corporation acquired the permit by assignment from Hufnagel (J.S. 2a).

[2] The Commission's conclusion that the record in the application proceeding in which the authority was granted shows that only "radial" operations were contemplated was not challenged in the district court (J.S. 11a) and is not challenged here.

[3] Appellant's request for a stay of judgment pending appeal and its petition for reconsideration were denied by the court below. On September 12, 1969, Mr. Justice Douglas issued a stay of the Commission's cease and desist order pending disposition of this appeal (J.S. 94a).

ARGUMENT

The question presented by this appeal—whether appellant's permit is ambiguous—is insubstantial. The district court correctly held that the permit was sufficiently ambiguous to justify the Commission's considering the evidence underlying its issuance. As the court noted (J.S. 5a), the interpretation of a certificate or permit issued by the Commission is primarily a question for that agency. *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171. Unless the Commission's interpretation is clearly erroneous, it is binding on the courts. *Nelson, Inc. v. United States*, 355 U.S. 554.

Contrary to appellant's contention (J.S. 9 *et seq.*), the Commission did not look to the underlying record to determine that the permit was ambiguous; rather it found in the first instance that the language itself was "patently indefinite and ambiguous" (J.S. 22a). Only then was resort had to the underlying record to resolve the ambiguity. The district court agreed; it ruled that the absence of certain limiting words ordinarily found in grants of radial authority is not conclusive where the permit is otherwise ambiguous (J.S. 6a), and found that the permit could be construed as authorizing either non-radial or radial operations "without violence to [its] language" (*Ibid.*).

T. I. McCormick Trucking Co. v. United States, 298 F. Supp. 39 (D.N.J.), relied on by appellant, is inapposite. There, in remanding the proceedings for a second time, a divided court decided that the Commis-

sion had erred in relying on its expertise to find a certificate clear on its face after having previously found the certificate ambiguous on its face. The majority of the district court stated that deference to the Commission's expertise in construing non-technical territorial descriptions, as opposed to commodity descriptions, is not required where the construction turns on a rule of grammar (298 F. Supp. at 41). Here there has been no such vacillation, and the language of the certificate is, if anything, more consistent with radial authority than with non-radial.

Finally, there is no merit to appellants' contention (J.S. 13) that the district court erred in determining that the appellant was not entitled to rely as a "good faith purchaser" on its original interpretation of the permit. The court properly ruled that appellant should not be accorded special consideration here, "where the language of the permit presents such a glaring error or inconsistency that [a good faith purchaser] should be put on guard" (J.S. 7a; and see J.S. 25a–28a, 53a–58a).

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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